IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	CRIMINAL ACTION
v.	:	
PHILIP ANDRE RENNERT, et al.	:	NO. 96-51
Newcomer, J.		September , 1997

M E M O R A N D U M

Presently before this Court are Philip Rennert's Motion for a Judgment of Acquittal and/or New Trial, David Yeaman's Motion for Judgment of Acquittal and for a New Trial, Michael Miller's Motion for a Judgment of Acquittal and for a New Trial, George Jensen's Motion for Judgment of Acquittal and for a New Trial, and Nolen Mendenhall's Motion for Judgment of Acquittal and a New Trial, and the government's response thereto. For the following reasons, the Court will deny the defendants' motions.

I. Introduction

On February 7, 1996, an indictment was filed charging the defendants in 18 counts, including conspiracy (one count), wire fraud (seven counts) and securities fraud (ten counts). On December 26, 1996, a stipulation and order was entered in which the government agreed to voluntarily dismiss five counts against defendants.

Count One charged defendants Philip Rennert, David Yeaman, Michael Miller, George Jensen and Nolen Mendenhall with conspiracy to engage in wire fraud and securities fraud in violation of 18 U.S.C. § 371. Counts Two through Eight charged defendants Rennert, Yeaman, Miller, Jensen and Mendenhall with

wire fraud in violation of 18 U.S.C. § 1343 and aiding and abetting in violation of 18 U.S.C. § 2.

Count Nine charged defendants Rennert and Mendenhall with securities fraud in the offer and sale of stock in violation of 15 U.S.C §§ 77q(a) and 77x. Count Eleven charged defendants Rennert, Miller, Jensen and Mendenhall with securities fraud in the offer and sale of stock in violation of 15 U.S.C. §§ 77q(a) and 77x.

Count Thirteen charged defendants Rennert, Yeaman and Mendenhall with securities fraud in the offer and sale of stock in violation of 15 U.S.C. §§ 77q(a) and 77x. Count Fifteen charged defendants Rennert, Yeaman and Mendenhall with securities fraud in the offer and sale of stock in violation of 15 U.S.C. §§ 77q(a) and 77x. Count Seventeen charged defendants Rennert, Yeaman and Mendenhall with securities fraud in the offer and sale of stock in violation of 15 U.S.C. §§ 77q(a) and 77x.

The indictment alleged that the conspiracy charged in Count One began in or about May 1990 and continued until in or about June 1992. The indictment charged the defendants with defrauding an insurance company (World Life and Health Insurance Company), its policyholders and the Guarantee Fund of the Commonwealth of Pennsylvania. According to the indictment, the defendants engaged in fraudulent schemes to provide virtually worthless stocks to reinsurance companies that permitted World Life and Health Insurance Company ("World Life") to sell group medical insurance plans.

The defendants allegedly entered into stock leasing agreements with a group of reinsurance companies controlled by unindicted co-conspirators for the purpose of earning fees derived from the sale of group medical insurance plans. Through various means alleged in the indictment, the defendants created the false appearance that the stocks had substantial value. The reinsurance companies used the stocks to enter into reinsurance contracts with World Life, which, in turn, allowed World Life to sell the group plans. In 1991, World Life failed and was liquidated by the Commonwealth of Pennsylvania. At the time of the liquidation, according to the indictment, there were approximately $5.3 Million in unpaid claims by the individual policyholders in the group plans. The unpaid claims were covered by a fund created by the Pennsylvania Life and Health Insurance Guarantee Association, known as the Guarantee Fund.

After a five and one-half week trial, the following defendants were convicted by a jury of various charges alleged in the instant indictment, as follows:

1) Philip Rennert: Count I (Conspiracy), Counts 2-4, 7-8 (Wire Fraud), Counts 9, 11, 13, 15, 17 (Securities Fraud);

2) David Yeaman: Count I (Conspiracy), Counts 2-4, 7-8 (Wire Fraud), Counts 13, 15, 17 (Securities Fraud);

3) Michael Miller: Count I (Conspiracy), Counts 2-4, 7-8 (Wire Fraud), Count 13 (Securities Fraud);

4) George Jensen: Count 13 (Securities Fraud); and

5) Nolen Mendenhall: Counts 9, 13, 15 (Securities Fraud).

The jury acquitted all the defendants of Counts 5 and 6 (Wire Fraud) and acquitted Mendenhall of Count 17 (Securities Fraud). The jury was unable to reach a verdict as to Jensen and Mendenhall as to Count 1 (Conspiracy) and Counts 2-4, 7-8 (Wire Fraud). A mistrial was declared as to those counts by the Court.

The defendants have filed motions under Federal Rules of Criminal Procedure 29 and 33, which allege a wide range of complaints, aiming principally at an alleged lack of proof by the government, alleged errors in the Court's instructions to the jury and in the Court's ruling on evidence proffered by the defendants. In their motions, the defendants make some arguments which only address a complaint of a particular defendant, and they make other arguments which address complaints that apply to all of the defendants. In addition, all of the defendants join in any argument of another defendant which may relate to them. The government has filed a single response, addressing each and every one of the defendants' arguments. The government, in general, argues that the defendants' contentions are without merit and that their post verdict motions should be denied. The Court will address these arguments seriatim.

II. Rule 29 Motions for Judgment of Acquittal

A. Rule 29 Standard

The district court shall order entry of judgment of acquittal "if the evidence is insufficient to sustain a conviction of such offense or offenses. Fed. R. Crim. P. 29(a). The standard to be applied by a trial court in deciding a motion

for judgment of acquittal in a criminal case is "whether, after viewing the evidence in light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319 (1979); United States v. Coleman, 862 F.2d 455, 460-61 (3d Cir. 1988).

The verdict must be sustained if there is substantial evidence, taking the view most favorable to the government, to support the verdict. United States v. Aguilar, 843 F.2d 155, 157 (3d Cir. 1988). Thus, the evidence in the record must be examined as a whole and in the light most favorable to the government. See United States v. Lowell, 649 F.2d 950, 958 (3d Cir. 1981). The government must be given the benefit of inferences that may be drawn from the evidence and the evidence may be considered probative even if it is circumstantial. See United States v. Pecora, 798 F.2d 614, 618 (3d Cir. 1986). The verdict will be overruled only if no reasonable fact finder could accept the evidence as sufficient to support the conclusion of the defendant's guilt beyond a reasonable doubt. United States v. Leo, 941 F.2d 181 (3d Cir. 1991).

B. Variance

A variance results when the charging language of the indictment remains unaltered, but the evidence at trial proves facts other than those alleged in the indictment. See United States v. Castro, 776 F.2d 1118, 1121 (3d Cir. 1985) (citation omitted). The principal issue underlying the concern over

variance is whether the defendant has been fully advised by the indictment of the actions giving rise to the charges against him so that the constitutional requirements of fair notice and double jeopardy concerns are met. See id. at 1122. However, even "a finding of a master conspiracy with sub-schemes does not constitute a finding of multiple, unrelated conspiracies and, therefore, would not create an impermissible variance." United States v. Smith, 789 F.2d 196, 200 (3d Cir. 1986). Because a variance is less severe an infringement of a defendant's rights to be tried only on the charges returned by a grand jury than, for example, a constructive amendment, courts will rarely reverse a conviction based on variance unless the defendant can show substantial prejudice. Castro, 776 F.2d at 1121-22 (variances constitute reversible error in those cases where the variance prejudice the defendant's defense). Moreover, variances relating to non-material elements are neither prejudicial nor fatal to a conviction. See, e.g., United States v. Massey, 827 F.2d 995, 1004 (5th Cir. 1987) (no fatal variance between indictment charging conspiracy to defraud subsidiary company and proof at trial of fraud on parent company where defendants were fully advised by indictment of actions giving rise to the charge).

In some cases, allegations in the indictment "unnecessary to and independent from allegations of the offense proved may normally be treated as a 'useless averment' that 'may be ignored.'" United States v. Miller, 471 U.S. 130, 136 (1985). Thus, where the indictment averred events occurring in Texas and

Florida, but the remaining averments in the indictment and the proof at trial was clearly sufficient to support a jury finding of conspiracy to purchase drugs in Pennsylvania, the alleged variance was not fatal. The court reasoned that the indictment clearly set forth the "theories" by which the defendants violated the statute, and the evidence at trial conformed to the "theory of a conspiracy" to purchase drugs as set out in the indictment. Accordingly, the court deemed the offenses occurring in Texas and Florida to be properly characterized as "unnecessary" to the conspiracy proved at trial and, as such, defendants were not prejudiced.

In this case, the government claims that its proof of "theory of conspiracy" at trial conformed to the "theory" articulated in the indictment. The government contends that the allegations that the named victims were defrauded by the defendants was sufficiently proved at trial. The government further asserts that the indictment clearly set forth the theories by which the defendants violated the statutes charged and that the evidence at trial conformed to the theory of conspiracy as set out in the indictment.

The government argues that, as in Castro, the indictment and proof at trial satisfied the underlying constitutional concerns: (1) there was no prejudicial surprise at trial by the proof offered concerning the defendants' knowledge of the use of stocks which worked to defraud World Life and its policyholders and (2) the indictment and conviction are

sufficient to allow these defendants to plead it as a bar under double jeopardy to any future prosecutions.

C. Evidence of Conspiracy

In this case all of the defendants join in various arguments suggesting that acquittals should be entered because the government's proof at trial created a prejudicial variance from the indictment, under the defendants' theory that there was insufficient evidence to prove that any of the defendants specifically agreed to defraud the victims named in the indictment, namely, World Life, its policyholders and the Guarantee Fund.1/ The government contends that the defendants' arguments are without merit because: (1) the government's evidence at trial adequately supports a finding that defendants Rennert, Miller and Yeaman, who were convicted of conspiracy, did know the specific identity of the named victims and (2) even if the evidence did not support such a finding of specific knowledge, knowledge by the conspirators of the specific victim is irrelevant and unnecessary to the government's burden of proof of the existence of the conspiracy charged and a conspirator's participation in it.

1. Elements of Conspiracy

1/ Because Jensen and Mendenhall raise these similar variance issues in the context of the substantive securities fraud counts for which they were convicted, the issue of whether there exists sufficient evidence to support their substantive securities fraud convictions will be discussed infra.

The elements needed to prove a conspiracy have been variously stated, but generally reduced to three elements: "The three elements of Section 371 Conspiracy are (1) the existence of an agreement, (2) an overt act by one of the conspirators in furtherance of the objective, and (3) an intent on the part of the conspirators to agree as well as to defraud the United States." United States v. Rankin, 870 F.2d 109, 113 (3d Cir. 1989). "The essence of criminal conspiracy . . . is an agreement, either explicit or implicit, to commit an unlawful act, combined with intent to commit an unlawful act, combined with intent to commit the underlying offense." United States v. Kapp, 781 F.2d 1008, 1010 (3d Cir. 1986).

In United States v. Rosenblatt, 554 F.2d 36 (2d Cir. 1977), the Court held that the law of conspiracy requires agreement as to the object of the conspiracy. This does not mean that co-conspirators must be shown to have agreed on the details of the criminal enterprise, but only that the essential nature of the plan was shown. For example, in United States v. Rapp, 871 F.2d 957, 964-65 (11th Cir. 1989), defendants knew of the fraudulent multi-million dollar loan transaction, but the evidence did not show the defendant knew of the stock purchase aspect of the conspiracy. Nevertheless, the defendants conviction for conspiracy was upheld, the court holding that defendants were guilty of conspiracy when they had knowledge of two of the conspiracy's primary objectives, even though they did not know the exact scope of the conspiracy.

Once sufficient evidence of a conspiracy is established, only slight evidence of the defendant's connection to it is required. United States v. Kates, 508 F.2d 308, 310 n.4 (3d Cir. 1975); United States v. Gironda, 758 F.2d 1201, 1271 (7th Cir. 1985).

The question posited at this time is whether the government produced substantial evidence at trial to support each and every element of the conspiracy so that any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. As will be discussed below, the Court finds that the government produced substantial evidence at trial upon which the jury verdicts for conspiracy can rest.

2. Indictment and Proof at Trial

The indictment alleged that the objects of the conspiracy were wire fraud and securities fraud. (Indictment ¶ 4 a-c). These specified objects were alleged to have victimized World Life, its policyholders and the Guarantee Fund. The indictment also alleged that the purpose of the conspiracy was "financial enrichment", (Indictment ¶ 5), accomplished by two means: first, "by providing, and causing to be provided, virtually worthless stock for use as collateral and as corporate assets purportedly available under reinsurance contracts with World Re2/ . . ." and, second, "by falsely representing the said

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2/ World Re, Inc. ("World Re") was a Delaware corporation based in Atlanta, Georgia, and was part of the Teale Network. From in or about November 1989 to in or about June 1991, World Re (continued...)

stock as being marketable and valuable, to defraud World Life, its policyholders and the Guarantee Fund." (Indictment ¶ 5).

A review of the evidence of record in this case establishes that Rennert, Mendenhall, and Miller, through Forum Rothmore ("Forum") and on behalf of themselves, Yeaman, Jensen and Jeffrey Hays,3/ entered into numerous agreements to lease stock as assets to the insurance companies connected with Alan Teale.4/ Both the Forum brochure and a recorded conversation with Mendenhall evidenced that Forum's role included examination of a lessee insurance company's business to provide a basis for

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2/ (...continued)
managed reinsurance contracts on behalf of the Teale Network reinsurance companies, which were held out as providing reinsurance of group medical insurance policies issued by World Life.

3/ Jeffrey Hays is an indicted co-conspirator who plead guilty prior to trial and testified on behalf of the government against the other defendants.

4/ The indictment alleged that Alan Teale, as well as Charlotte Rentz, who were indicted elsewhere, owned and controlled a network of foreign and domestic shell companies ("the Teale Network"). The indictment alleged that these companies were falsely held out by Teale, Rentz and others as being well-capitalized reinsurance companies domiciled offshore and domestic service companies which managed the business of the offshore reinsurance companies.

The indictment alleged that the defendants entered into a complex and sophisticated conspiracy to commit wire fraud and securities by providing worthless stock to Teale to enable Teale to use the worthless stock as assets on the balance sheets of the offshore companies controlled by the Teale Network. The offshore insurance companies, in turn, obtained reinsurance contracts with U.S. insurance companies, including World Life, based on fraudulent representations, which allegedly originated with the defendants, about the value and marketability of the stock assets.

the recommendation to a stock provided that the lessee's company was a good match for the stock.

Among other manner and means charged, these so-called "assets" were made available through the fraudulent activities of Rennert, Yeaman, Miller, Jensen, Mendenhall and Hays, which included creating shares, rigging and supporting artificial, highly inflated prices for the leased stock in the over-the-counter market, in order to give a high market value to the stock provided under the Forum contracts with the Teale Network. Much of the evidence produced in the four weeks of testimony at trial was directed to and substantially supported this allegation and theory of conspiracy. The purpose of this artifice was self-evident: the higher the artificial market price, the more the defendants could obtain in leasing fees from Teale and, accordingly, the more insurance policies the Teale companies could write to obtain its policyholders premiums.

The Forum brochure (Ex. 55), as well as the numerous surplus contributions agreements ("RENN contracts") (see generally Ex. 43), clearly support a finding of knowledge by the participants — Rennert, Yeaman, Miller, Jensen and Mendenhall — of the intended purposes for which these inflated stocks were to be used once they were leased by the Teale insurance companies. The evidence would support a finding that the defendants knew and intended these stocks to be used on financial statements and in collateral accounts to support policyholders' claims for any business written by the lessee insurance companies.

The evidence also supports a finding that Rennert and Mendenhall directly provided valuations of these stocks to auditors for the Teale Network insurance companies which reinsured World Life. (Exs. 43-128 Letters to Prof. Missorten of 2/25/91 and 6/4/91). Even if this fact alone does not establish direct knowledge of the specific identity of World Life as an ultimate victim, it should have been a readily foreseeable result to the defendants that the false and misleading information that they provided would be further disseminated by mail or wire by the Teale Network co-conspirators to ultimate victims. See United States v. Schurr, 794 F.2d 903, 909 n.8 (3d Cir. 1986) (conspirators liable for conspiracy to accomplish whatever foreseeable crimes their co-conspirators commit in the course of accomplishing the main objective of the conspiracy).

The evidence at trial would also support a finding that the defendants intended, and, in fact, did financially enrich themselves by these fraudulent means, up to $3.3 million. Both the brochure of Somerset Marketing (Rennert's predecessor company to Forum) and then of Forum described the mechanism, as well as the dollar amount, of the leasing fee to be earned by asset (stock) providers. (Exs. 47 (9, 15 and 16); Ex. 56 (6, 12 and 13)). Further, the surplus contribution agreements set forth the formula for the dollar amount of the leasing fee as being the number of shares leased times the bid price of the stock in the market. Asset providers received 7% of the formula for bulletin board stocks and 8% for NASDAQ stocks. (Exs. 43-106, 43-124, and

43-133, ¶ 1.0 and the promissory note attached thereto; Ex. 43-106, p. 12). These figures were consistent with the money actually received by the defendants under the RENN contracts. 5/

Wire transfers from World Re for $790,000 and for 503,914 were admitted into evidence. (Exs. 40A, 40B). These exhibits demonstrated the flow of funds from World Life (policyholders' premiums) to World Re and then from World Re to Forum. Internal records of Forum showed the division of monthly and annual fees paid to each of the defendants on a per stock basis under each contract. (Ex. 110). The work papers of Forum's accountant showed which defendant was paid and in what dollar amounts as of December 1991, and a government agent analyzed the payments to each defendant and traced the money as stated above. (Exs. 79-e; testimony of Special Agent William Turpin). This evidence adequately demonstrated Rennert, Yeaman and Miller, the defendants convicted of conspiracy, were paid specifically under contracts for stock earmarked for an escrow account which was established by World Re to support reinsurance business with World Life. One such Renn Contract, RENN 133, specified on its face the name "Worlco" and the designated custodian "Corestates Bank in Philadelphia, Pennsylvania." (Exs. 43-133, 106 Supp.). The evidence offered at trial supports a finding that during the period of the conspiracy, this contract

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5/ There is no requirement, however, that the government prove that the scheme succeeded or that the defendants actually obtained scheme proceeds. United States v. Curtis, 537 F.2d 1091 (10th Cir. 1976).

was physically in the possession of each of the defendants convicted of conspiracy. (Ex. 32).

Thus, the Court finds that consistent with the law of conspiracy and the indictment, the government established that: (1) Rennert, Yeaman and Miller, the defendants convicted of conspiracy, intended to carry out the objects of the conspiracy, i.e., violations of wire fraud and securities fraud statutes; (2) these defendants knew that the stocks would be used as assets at market value on the financial statements of an insurance company; (3) specifically, that World Life and its policy holders was a known or at least a foreseeable victim of that fraudulent activity and; (4) the purpose of the conspiracy was as alleged in the indictment, financial enrichment, by providing worthless stock and by falsely representing its value and marketability (Indictment ¶ 5). Consequently, the Court concludes that the evidence, as generally summarized above, well supported the verdict and is sufficient.

Beyond the evidence as summarized above, the government provides a detailed description of evidence which was introduced at trial to convict each of the three defendants who were found guilty of conspiracy to commit wire and securities fraud. After reviewing this evidence, the Court finds that there was more than sufficient evidence offered at trial with respect to each of the three defendants who were found guilty of conspiracy to commit wire fraud and securities fraud and that they specifically victimized World Life, its policyholders and the Guarantee Fund.

On pages 18-22 of the government's brief, the government details a substantial amount of evidence that supports the finding that Rennert knew that the stocks provided by Forum had prices that were rigged and artificially maintained, that those stock prices wound up on the financial statements of various insurance companies which engaged in business with World Life on the basis of those inflated assets, and that World life, its policyholders and the Guarantee Fund were victims of that fraud. Thus, the Court rejects Rennert's Rule 29 motion with respect to the conspiracy conviction.

The Court also must reject Yeaman's challenge to his conspiracy conviction under Rule 29. As thoroughly set forth in the government's brief at pages 22-24, there was ample and sufficient evidence offered at trial to demonstrate that Yeaman knew that the stock leasing scheme with World Re and Teale also specifically involved and implicated World Life and its policyholders as potential victims.

With respect to Miller, the Court also finds that there was sufficient evidence to support his conspiracy conviction. The government, at pages 24-27, details the substantial evidence that was offered at trial against Miller and supports his conspiracy conviction. Much of this evidence dealt with Miller's efforts to contrive a falsely inflated financial statement for the Ecotech Corporation ("Ecotech")6/ to provide Forum with

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6/ Ecotech was one of the stock companies that Forum entered (continued...)

attorney letters to improperly remove restrictive legends from restricted shares of Ecotech stock, and for insupportable demands on the transfer agent to stop transfer of Ecotech certificates whenever stock was threatened to be sold in the marketplace. The evidence at trial would support a finding that Miller's role in this scheme was to provide Forum and Rennert with an attorney's imprimatur and false appearance of legitimacy to the scheme to issue inflated, restricted stock in leasing contracts to the Teale offshore companies. As exhibit 44 charts of the RENN agreements demonstrate, Ecotech was the hallmark stock of Forum, accounting for nearly one-half of the total value of the assets provided to Teale from September 1990 through approximately July 1991, when several contracts switched stocks due to public exposure. This abundant evidence clearly established Miller's connection to the objects of the conspiracy to commit wire fraud and securities fraud. In addition, there is also sufficient evidence to demonstrate Miller's knowledge of the stock leasing arrangements between Rennert and Teale and even the specific identity of World Life, its policyholders and the Guarantee Fund as victims of the conspiracy. Because the evidence abundantly

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6/ (...continued)
into and managed leasing agreements for over-the-counter stocks with the Teale Network for use on financial statements of Teale Network reinsurance companies doing business with World Life and to fund the World Re escrow accounts for the benefit of World Life. Evidence was offered at trial to support the government's allegation that the stocks issued by Ecotech, as well as other companies, were falsely held out by the defendants to be marketable and valuable, when in fact, the stocks were not marketable and virtually worthless.

and sufficiently supports the jury's verdict that Miller was guilty of conspiracy, as charged in the indictment, the Court rejects Miller's Rule 29 motion with respect to his conspiracy conviction.

D. No Requirement of Proof that Defendants Knew the Entire Scope of the Conspiracy or the Specific Identity of the Victims

1. Chain Conspiracy

Defendants claim that because they did not directly negotiate the reinsurance contracts with World Life, they are not responsible for defrauding it or for the actions of the Teale Network. For the following reasons, the Court rejects defendants' argument.

By analogy, the Court notes that defendants' argument is the type of argument which has been unsuccessfully advanced by defendants in narcotics cases who contend that their only express intent was to deal with their immediate associates for the purpose of accomplishing narrow goals, such as to smuggle narcotics, distribute them or retail them to the public. Defendants argue that they were neither participants in nor intended to effect the criminal ends of the larger conspiracy. In general, courts have rejected such an attempt to limit the conspiratorial intent, holding that the defendants knew that "the success of their independent venture was wholly dependent on the success of the entire chain." United States v. Agueci, 310 F.2d 817, 826-27 (2d Cir. 1962). The Agueci court reasoned that:

> An individual associating himself with a "chain" conspiracy knows that it has a "scope" and that for its success it requires an organization wider than may be disclosed by his personal participation. Merely because the government in this case did not show that each defendant knew each and every conspirator and every step taken by them did not place the complaining appellants outside the scope of the single conspiracy. Each defendant might be found to have contributed to the success of the overall conspiracy, notwithstanding that he operated on only one level.

Id. at 827.

This reasoning has been applied in cases of market manipulation. In United States v. Cohen, 518 F.2d 727, 735 (2d Cir. 1975), defendant's conviction for conspiracy to commit market manipulation was upheld because he "was participating with his co-defendants in the continuing scheme," even though one group of defendants were pursuing other related fraudulent activities concurrently with their activities to manipulate price of the stock. The court found that even though this defendant did not participate in every one of the other frauds perpetrated by the other defendants, and even though this defendant may not have known of the specific details of those extra activities, he nonetheless was held responsible for them as well.

The question is whether there was a single conspiracy or multiple conspiracies. In United States v. Padilla, 982 F.2d 110, 114 (3d Cir. 1992), the court employed a three-step inquiry to determine if a series of events constitute a single conspiracy: (1) whether the conspirators had a common goal; (2) whether the nature of the scheme was such that the agreement contemplated bringing about a continuous result that would not

continue without the continuous cooperation of the conspirators; and (3) to what extent did the participants overlap in various dealings. Evidence is sufficient to link all of the defendants charged with the conspiracy even where not all of the defendants know of the identities of all the other participants in the conspiracy. United States v. De Peri, 778 F.2d 963 (3d Cir. 1985). The government need not prove that the defendants ever got together in a single group and agreed to a single, unified plan. United States v. Donsky, 825 F.2d 746, 753 (3d Cir. 1987).

The evidence at trial supports a jury finding of a single conspiracy linked together by a common goal and not two separate, independent conspiracies. Success of each link in the chain was dependent on the activities of all the co-conspirators, both those associated with Forum and those associated with the Teale Network. The stocks to be provided through Forum could not be a source of income to these defendants unless Teale was successful in arranging reinsurance treaties with primary insurance companies whose policy holders provided that cash flow with their premium dollars. The reinsurance arrangements could not be successful unless the stocks provided by the defendants could be held out by Teale as "marketable" and valuable, so that their artificiality inflated market values could be placed on the balance sheets of the reinsurance companies, i.e., the stocks were worthless without the insurance network, and insurance network could not operate without the stocks as assets.

In the cases of chain conspiracy, the element of knowledge of the larger operation may be satisfied by proof of actual knowledge or proof of participation in the transaction from which knowledge of the common design and purpose may be inferred. Agueci, 310 F.2d 817. In this case, the evidence supports a finding that Rennert learned of Teale's scheme through Rennert's leasing of Heartsoft stock through Brooke-Allman, and Rennert quickly desired to be Teale's "right-hand" man. According to Hays, Teale was the only one "who was actually paying money" for his "window dressing" stock. Rentz testified that Rennert was fully informed about how the stock leasing arrangement worked from the first meeting. When Rennert set up Forum, his own brochure spelled out the entire scheme. Rennert was also well aware of the stocks and the market values ascribed to them in each of the surplus agreements — indeed, they were styled "RENN" contracts — and he signed every one of them. Both Rennert and Teale closely monitored and kept each other constantly informed of anything that could jeopardize their scheme, such as public exposure of the stocks. (Exs. 16, 22-24, 28-A-B, 29).

Moreover, Rennert and Miller, as well as Mendenhall, were on the Board of Directors of one of Teale's shell companies — Europe and Transpacific Mercantile Insurance — from which these defendants learned firsthand from Teale how stocks could be used to inflate financial statements and obtain a flow of cash from

reinsurance premiums without any start-up costs. (Ex. 42-105 (2)).

The evidence also supports a jury finding that defendants knew that they would not obtain any money for the otherwise worthless paper they provided to Teale unless the stocks were used in the insurance business to generate an income flow to the Teale Network. Thus, the defendants cannot now point the finger solely at Teale. Based on the ample amount of evidence in this case as to the knowledge and intent of the defendants in their transactions with the Teale Network, the evidence clearly and sufficiently supports the finding that the defendants knew and agreed to the implications of their conduct on the ultimate victims.

2. Specific Identity of the Victims

Defendants argue that in order to be convicted of conspiracy the government must establish that the sole purpose of the conspiracy was specifically and exclusively to defraud World Life, its policyholders and the Guarantee Fund. Because this argument is contrary to the law and the indictment in this case, the Court rejects this argument.

As stated above, it is sufficient to show that the defendants had the specific intent to engage in the objects and purposes of the conspiracy, i.e., to violate the wire fraud and securities fraud statutes for the purpose of financial enrichment. While the government's proof as to how they accomplish these goals may not be so inconsistent with the

indictment so as to constitute a prejudicial variance, this requirement does not elevate the identity of the victim to an element of the offense or prerequisite of proof to establish any defendant's enlistment in the conspiracy. United States v. Wayman, 510 F.2d 1020, 1025 (5th Cir. 1975) (citation omitted). Because knowledge of the specific identity of the victim is not required under wire or securities fraud statutes, the defendants could not be substantially prejudiced even in the absence of any proof that they specifically knew the victim's identity.

In United States v. Feola, 420 U.S. 671 (1974), the Supreme Court held that there is no requirement in a conspiracy case to prove the identity of a specific victim, unless a statute specifically requires it. In Feola, the defendants attacked two men in what they believed to be a narcotics "rip off" of drug buyers. To the defendants' surprise, they were charged with assaulting and conspiring to assault federal officers, because their prey were, in fact, undercover federal narcotics agents. The Supreme Court affirmed the lower courts' finding that in order to find the defendants guilty on either the conspiracy or substantive assault of a federal officer, the jury was not required to find that the defendants were aware of the identity of their victim, even though that fact conferred federal jurisdiction. The Court found that only the scienter required for the substantive offense was required to convict of the conspiracy. In Feola, the scienter required for the substantive assault did not also depend upon whether the assailant was aware

of the official identity of his victim at the time he acted. Id. at 692-93.

In the instant case, the evidence established that the defendants, who were convicted of conspiracy, conspired to defraud insurance companies by contributing manipulated stocks to support the insurance policies written. That is all that the government was required to show. It makes no difference whether the defendants knew or specifically intended to defraud the specific insurance company or other victims named in the indictment. Nowhere in the scienter requirements for wire fraud or securities fraud is there an element requiring knowledge of the identity of the victim. Thus, no higher scienter can be applied to the sufficiency of proof of conspiracy.

Accordingly, even if there had been no proof at trial about the extent of the defendants' knowledge and intent to defraud, specifically, World Life, its policyholders or the Guarantee Fund, that would not be fatal to the sufficiency of proof of the indictment.

E. Sufficiency of Evidence of Conspiracy to Commit Wire Fraud

Defendant Yeaman also argues that the government failed to prove that he "did cause" the transmittal of the wires listed in Counts Two through Eight. As such, he claims that there is insufficient evidence to support this conviction. The government claims that this contention is unfounded.

Generally, there is no requirement that the government prove specific intent to use mails (or wires) as an essential element of the scheme because it is jurisdictional, so long as it was foreseeable that mails (or wires) could be used in furtherance of the scheme. United States v. Turley, 891 F.2d 57, 60 (3d Cir. 1989). As the court in United States v. Cusino, 694 F.2d 185, 188 (9th Cir. 1982) stated, regarding the wire fraud statute: "The specific intent requirement under 18 U.S.C. § 1343 pertains to the scheme to defraud . . . not to the causing of wire transmissions." The defendant does not actually have to know that the mails were used:

> Where one does an act with knowledge that the use of the mails will follow in the ordinary course of business, or where such use can reasonably be foreseen, even though not actually intended, then he "causes" the mails to be used.

Periera v. United States, 347 U.S. 1, 8-9 (1954). Neither is specific intent to use the wires a necessary element in a wire fraud conspiracy. United States v. Klein, 515 F.2d 751, 753 n.3a (3d Cir. 1975).

In this case, Yeaman may not claim that the transmittal of information by wire of the value and transfer of securities, including U.S. Card Investors, Inc. ("U.S. Card"), Omega Power, Inc. ("Omega") and American Family Services, Inc. ("AFS"), 7/ into

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7/ These companies were some of the stock companies that Forum entered into and managed leasing agreements for over-the-counter stocks with the Teale Network for use on financial statements of Teale Network reinsurance companies doing business with World Life and to fund the World Re escrow accounts for the benefit of (continued...)

the escrow account at Corestates was not "reasonably foreseeable" to him, even if he did not direct the correspondence himself. Yeaman caused the transmission of the information as to the value of stocks and their marketability, based on his own fraudulent activities in the secondary market to rig and support artificial inflated prices and his control over the transfer of restricted shares of U.S. Card, Omega and AFS under the guise of unrestricted certificates. The evidence shows that Yeaman himself used the phone and facsimile transmission in this regard.8/

F. Sufficiency of Evidence of Conspiracy to Commit Securities Fraud

1. Actual Purchasers

Yeaman, joined by the other defendants,9/ argues that there is no evidence of intent to defraud the Pennsylvania victims as the actual "purchasers" of the securities, this time from the point of view that the government failed to offer evidence that any defendant dealt directly with any of the alleged "purchasers," i.e., World Life, its policyholders or the

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7/ (...continued)
World Life.

8/ This analysis would apply equally to all the defendants who also raise this argument.

9/ Defendant Jensen also raises this same argument in the context of the substantive securities fraud count (Count Eleven) of which he was convicted. The same principles apply in the analysis of the substantive charge of securities fraud under Section 17(a)(3) of the Securities Act of 1933.

Guarantee Fund. Therefore, the defendants posit that no conviction can stand under Section 17(a)(3). 10/

In a prosecution for securities fraud, there is simply no requirement that there actually be a purchaser for a conviction to be sustained. Thus, the Court rejects defendants' argument. In United States v. Naftalin, 441 U.S. 768, 773 (1979), the defendants contended that the word "purchaser," which is found only in subsection (3), should be read into all three subsections. The Supreme Court rejected this argument:

> The short answer is that Congress did not write the statute that way. Indeed, the fact that it did not provides strong affirmative evidence that while impact upon a purchaser may be relevant to prosecutions brought under [subsection] (3), it is not required for those brought under [subsection] (1).

Id. Referring to the "punctuation" in the statute to support its conclusion, the Supreme Court stated:

> nothing on the face of the statute suggests a congressional intent to limit its coverage to frauds upon purchasers.

Id. at 774 n.5 (quotations and internal citation omitted). Thus, the defendants are simply wrong to argue that they must be proven to have intended to defraud World Life, its policyholders and the

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10/ Proof under Section 17(a) of the Securities Act requires that the defendant willfully: (1) employed any device, scheme or artifice to defraud; or, (2) obtained money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; or, (3) engaged in a transaction, practice, or course of business which operated or would operate as a fraud or deceit upon the purchaser. 15 U.S.C.§ 77(q)(a).

Guarantee Fund as actual "purchasers" or directly dealt with these victims in that capacity.

2. Evidence of Misrepresentations by Yeaman

Yeaman claims that the government failed to offer any proof that Yeaman himself made any of the representations about the offer or sale of the three stocks — U.S. Card, Omega and AFS — he contributed to the conspiracy. This argument by Yeaman simply ignores the evidence that was produced at trial about the misrepresentations charged and the theory of securities fraud set forth in the indictment. The indictment and proof at trial focused on three principal areas of misrepresentation with respect to Yeaman. After reviewing the evidence of record, the Court finds that there was sufficient evidence to prove that misrepresentations were created and disseminated directly as a result of Yeaman's fraudulent efforts to further the scheme to create inflated assets for the Teale leasing program.

The indictment first alleged that the stocks provided by Yeaman to the RENN contracts were misrepresented as to their market value; specifically, U.S. Card at $1.50 bid — $2.00 ask; Omega at $3.50 bid — $4.25 ask; AFS at $1.50 bid — $2.00 ask. (Indictment ¶6(j)). The testimony and documentary evidence that Yeaman was directly responsible for the phony creation of these quotations was substantial. The evidence substantially supports a finding that the information available to the marketplace as to the market value of the stocks was the direct result of Yeaman's activities in rigging the artificial prices of these stocks,

making representations to the marketplace through a market maker, and fraudulently supporting the artificial market quote with inflated assets reflected in financial information provided by the issuer. In the interests of time and space, the Court will not specifically set forth all of the evidence which supports a finding that Yeaman made certain misrepresentations, expect to note that the government details this evidence at pages 40-42 of its brief.

The indictment also charged the defendants with misrepresentations that the stocks in the escrow accounts were free trading when, in fact, they were restricted. The evidence at trial supports a finding that the defendants, as the indictment charged, used means to accomplish this part of the scheme, including making false representations to transfer agents and altering a document which was used to support the removal of restrictive legends.

Janice Ragsdale, Yeaman's employee at National Stock Transfer ("NST"), the transfer agent for U.S. Card, Omega and AFS, testified that she, under the supervision of Yeaman, whited-out the caption of Grossack's legal opinion letter so that it could be affixed to transfers of stock from Yeaman's affiliated companies (Capital General and IAFC) either to World Re or to Corestates Bank (Patterson & Co.). David Grossack testified that this application of his legal opinion for an unrelated transaction was done without his authorization or approval.

Ragsdale also testified that the "Regulation S" stamp that was placed on the face of the transfer records for the World Re shares into the name of "Patterson and Company" was done without any knowledge on her part as to the significance of this regulation. She stated that the transfers of stock to the insurance companies' leasing deals were supervised by Yeaman. Only the most routine activities for these transfers were done by her without Yeaman's direction. The parties stipulated that the transfer records of NST for 466,667 shares of U.S. Card, 186,667 shares of Omega and 400,000 shares of AFS, transferred from Yeaman's companies to World Re, then to Corestates, and finally to the Statutory Liquidator were, in fact, "restricted" on the books of each of the stock companies. Yet, none of the stock certificates provided to RENN contract 133 which provided these escrow shares, carried any restrictive legend or other indicia that they could not be sold freely.

The RENN 133 contract, a copy of which Yeaman possessed, clearly set forth the purpose for which this stock was to be used. The contract unequivocally stated that the securities provided under the contract were "not subject to restriction." (Ex. 43-133, p.2, ¶ 2.1). Thus, the evidence clearly supports a finding that the securities provided by Yeaman to RENN 133 were falsely represented by him to be free trading, in furtherance of the securities fraud charged in the indictment.

With respect to Ecotech, transfer agent Bruce Rogers testified that he received an affidavit from George Jensen

stating that 5 millions shares of Ecotech restricted stock had been held by Jensen for more than three years and that Jensen had not been a control person of Ecotech for more than three months. This affidavit was a necessary prerequisite for the removal of the restrictive legend by Rogers on the new certificates issued from the 5 million shares. Despite this affidavit, evidence at trial supports a finding that Jensen's averments were false.

The records of Ecotech and the records of Trans National Transfer, Ecotech's transfer agent, established that the 5 million share Ecotech certificate, subject to the false affidavit, had been issued to Jensen only 13 months earlier. Moreover, the transfer agent's records and summary chart of Ecotech's control shareholders support a finding that Jensen had been a control person of Ecotech, by virtue of shares controlled by him, during the prior three months. Neither did the movement and creation of Ecotech stock by Jensen, Rennert, Miller and Mendenhall alter Jensen's status as a control person, because the evidence would support a finding that they were all working in concert.

Jensen caused Rogers to reissue the restricted certificate into two certificates without restrictive legends, one of which was issued to Rennert for 2.5 million shares. Then, Rennert created several smaller certificates from the 2.5 million shares, also without restrictive legend, from which 160,000 shares was provided under RENN 124 to World Re for the escrow account for the benefit of World Life. Jensen and Miller were

each paid leasing fees for Ecotech stock under RENN 124, despite the fact that the shares provided to this contract were all in Rennert's name.

Thus, the evidence showed that the allegations in the indictment concerning misrepresentations of restrictions on the shares of stock pledged to the Corestates escrow account for World Life was properly charged. The proof did not vary from the charges in the indictment and it is sufficient to support a verdict.

The indictment also charges Yeaman with having failed to disclose that he previously had been found to have violated securities laws. (Indictment ¶ 6(o)(2)). The Court finds, despite Yeaman's objections to the contrary, that the testimonial and documentary evidence of filings with the Securities and Exchange Commission ("SEC") supports a finding that Yeaman failed to disclose material information of his prior and ongoing securities law violations in 10-Ks filed with the SEC by U.S. Card and Omega. (Testimony of DeLacy; Exs. 94-C(33-44), 99-B (13-23), 133).

Accordingly, the Court finds that Yeaman's argument for acquittal as to misrepresentations charged in the indictment is without merit.

3. The Materiality of Misrepresentations

Yeaman contends that even if he was responsible for the misrepresentations charged in the indictment, they were not material because there was publicly available information that

the public issuers were development stage companies and because World Life "rejected the stocks." The Court finds that these arguments are without merit.

To begin, the indictment did not allege material misrepresentations made by the defendants concerned with the state of the issuers of small, development stage companies. Instead, as discussed in the preceding section, the principal misrepresentations alleged in the indictment concerned the market price and value and the marketability of the escrow stocks. The remaining allegations concerned material misrepresentations as to the percentage of stock holdings and control of the issuer by each of the defendants, the value of the primary asset of the issuer, which in the case of each stock was substantially inflated and the failure by Yeaman to disclose prior securities violations.

Moreover, what Yeaman argues to be a clear "rejection" of the stock by World Life was, in fact, merely an assumption which is not supported by the evidence. Defendants' argument with respect to this issue seems to stem from a letter written by Ron Meyer, CEO of Worlco, requesting that World Re replace the escrow stocks with cash or cash equivalents. Defendants seem to argue that this letter proves conclusively that World Life must have had other material public information on which to base Meyer's alleged rejection of the stocks already delivered to the escrow account. Thus, the defendant contends that any

misrepresentations and omissions charged in the indictment cannot be deemed material.

This argument, however, first mischaracterizes the standards to be applied at this stage. Indeed, the Court must view the evidence in a light most favorable to the government at this stage, not viewed in a light most favorable to the defendants. The Court also finds that Yeaman's argument is not supported by the facts in this case or the law.

First, the defendants fail to establish why the material information they omitted to disclose becomes immaterial merely because certain indicia of risk associated with these stocks was available to World Life. In addition, the evidence demonstrated that Meyer's request was just that — a request. Evidence shows that the request was never honored. Indeed, the worthless stocks remain in the "estate" of World Life to this day. The facts simply do not support an argument that there was a rejection per se. Therefore, defendants are wrong to argue that the defendants never made any material misrepresentations or omissions.

The Supreme Court articulated its test in Basic, Inc. v. Levinson, 485 U.S. 224 (1987) that a material fact is one which would significantly alter the total mix of information available to a prospective purchaser or investor. After reviewing the record, the Court finds that there is no evidence in the record of this case which would support an argument that there was information provided by sources other than the

defendants themselves which significantly altered the total mix available, such that this other information turned the defendants' material misrepresentations and omissions into non-material information to justify an acquittal.

Finally, there is no requirement that the misrepresentations actually succeed in defrauding actual purchasers in order to establish securities fraud and conspiracy to commit securities fraud. Statements may constitute material misrepresentations even though a person obtains other information from other wholly independent sources as a basis for rejecting the offered stock. Moreover, there is no requirement under the federal securities laws to show any reliance by victims. SEC v. Rana Research, Inc., 8 F.3d 1358, 1363 (9th Cir. 1992).

4. Sufficiency of Evidence as to Jensen[11]/

Defendant Jensen argues that if the Court dismisses the conspiracy count on the basis of insufficiency of the evidence, all the substantive securities counts must also be dismissed because the jury could have overreached. This argument must be rejected though because there simply is no legal precedent that would support this argument under the facts of this case. Jensen also claims that the government's evidence failed to establish a specific intent to defraud the named victims in the indictment. For the reasons listed above in the conspiracy section, the Court rejects this argument.

11/ This section addresses Count Eleven, dealing with the substantive securities fraud charge.

Jensen, joined by Yeaman, further contends that the evidence fails to support his conviction because he never dealt directly with the victims as "purchasers," only with Forum. As explained above, in a prosecution for securities fraud, there is simply no requirement that there actually be a "purchaser" for a conviction to be sustained. Naftalin, 441 U.S. at 773. It logically follows that the government would have no burden to establish that the defendants dealt directly with the "purchaser."

As with his co-defendants, the evidence against Jensen sufficiently supports his conviction as to Count Eleven. The evidence supported his conviction of securities fraud under each of the subdivisions of Section 17(a). The evidence supports a finding that Jensen participated with co-conspirators Rennert, Miller and Mendenhall to artificially reduce the percentage of his Ecotech shareholdings so he could manipulate the secondary market under the guise of being an interested investor when, in fact, he was a control person and the purpose was to support the artificial bid price used to lease the stock to the Teale Network. (See Govt's Br. at 54-57; citing evidence of record). In sum, the evidence at trial is sufficient to support the verdict that Jensen engaged in acts, practices and courses of business, schemes and artifices to defraud by releasing unregistered securities into the marketplace, artificially maintaining the price of Ecotech stock, and by profiting

financially from the Ecotech stock that was pledged to an escrow account at Corestates under a surplus contribution agreement.

5. Sufficiency of Evidence of Securities Fraud as to Mendenhall

Defendant Mendenhall contends that if the jury hung on wire fraud and conspiracy counts and convicted him on the securities fraud counts which, he alleges, are supported on identical facts and theories, the verdict as to the counts cannot stand. This position is without merit.

The Supreme Court has held that there is no reason to vacate a conviction merely because the verdicts of acquittal on predicate charges cannot be rationally reconciled. The Supreme Court has noted that a jury may acquit on certain charges out of lenity or some other improper motivation. The defendant is protected against jury irrationality or error by the independent review of the sufficiency of the evidence on the convicted charges. United States v. Powell, 469 U.S. 57 (1984); United States v. Vastola, 989 F.2d 1318 (1993).

Moreover, the evidence against Mendenhall is more than sufficient to support the verdict as to the substantive securities counts. Mendenhall was the person who ran the operations of Forum. He, perhaps better than any other defendant, with the exception of Rennert, knew the precise details of the scheme and the identity of the victims, including World Life, and the purpose of the pledge of stock in the Corestates escrow account. Indeed, the government describes in

detail a vast amount of evidence that supports Mendenhall's substantive securities law convictions. (Govt's Br. at 59-62).

In sum, the Court finds that the convictions obtained by the government were all supported by sufficient evidence at trial. Thus, the Court will deny the defendants' Rule 29 motions for judgment of acquittal.

III. Rule 33 Motions for a New Trial

A. Legal Standards under Rule 33

A district court may grant a defense motion for a new trial, "if required in the interests of justice." Fed. R. Crim P. 33. The decision whether or not to grant a motion for a new trial is within the sound discretion of the trial court. United States v. Martinez, 763 F.2d 1297, 1312 (11th Cir. 1985).

"'A motion for a new trial is addressed to the trial judge's discretion . . . .'" United States v. Console, 13 F.3d 641, 665 (3d Cir. 1993) (quoting Government of the Virgin Islands v. Lima, 774 F.2d 1245, 1250 (3d Cir. 1985)). "A motion for a new trial is not favored and is viewed with great caution." United States v. Miller, 987 F.2d 1462, 1466 (10th Cir. 1993). This power should only be exercised sparingly. United States v. Bertoli, 854 F. Supp. 975 (D.N.J. 1994).

A new trial should be granted only where there is a reasonable probability that the trial error could have had a substantial impact on the jury's decision. Government of Virgin Islands v. Bedford, 671 F.2d 758, 762 (3d Cir. 1982). "The court has discretion in passing on the motion, but it should hold in

mind the harmless error provisions of Rule 52, and refuse to grant a new trial if the substantial rights of the defendant were not affected." Wright, Federal Practice and Procedure: Criminal 2d, § 551 (1982 & Supp. 1995).

Unlike motions for acquittal, in a motion for new trial the court need not view the evidence in the light most favorable to the government. Instead, the court must weigh evidence and consider the credibility of witnesses. See Martinez, 763 F.2d at 1312. The Eighth Circuit has explained that when considering a motion for a new trial:

> [t]he district court need not view the evidence in the light most favorable to the verdict; it may weigh the evidence and in so doing evaluate for itself the credibility of the witnesses. If the court concludes that, despite the abstract sufficiency of the evidence to sustain the verdict, the evidence preponderates sufficiently heavily against the verdict that a serious miscarriage of justice may have occurred, it may set aside the verdict, grant a new trial, and submit the issues for determination by another jury.

United States v. Lincoln, 630 F.2d 1313, 1319 (8th Cir. 1980). In making its Rule 33 inquiry, courts should always assess the weight of the evidence consistent with human experience.

B. Weight of the Evidence

In this case, all of the defendants make a general argument that the verdict was against the weight of the evidence. In addition to this argument, Yeaman contends that any misstatements or omissions were not reasonably calculated to deceive persons of ordinary prudence and comprehension, citing

United States v. Brown, 79 F.3d 1550, 1157 (11th Cir. 1996). For the following reasons, these arguments necessarily fail.

After reviewing the evidence at trial and assessing the credibility of the witnesses, the Court concludes that there was ample evidence to support the jury's verdict, much of which has already been described in the preceding sections. Although this case involved a complex scheme and conspiracy to defraud, the testimony and documentary evidence corroborated each other, demonstrating similar patterns of fraudulent activity among a common set of participants, in furtherance of a common goal. In light of these observations, the Court simply cannot find that the evidence preponderates sufficiently heavily against the verdict that a serious miscarriage of justice may have occurred. Thus, the Court rejects the defendants' general argument that the verdict was against the weight of the evidence.

The Court also rejects Yeaman's argument. First, the Court gave a "Brown" charge in its wire fraud instructions to the jury. Second, the circumstances which propelled the objective standard in Brown do not exist in this case. In Brown, the Eleventh Circuit found that snowbelt buyers of Florida homes could easily confirm the (defendant) seller's representations about the resale or rental value of the Florida homes "from readily available external sources." Id. at 1559. By contrast here, the stock market was the only readily external source to which the purchasers of the Forum stocks could turn and that

source was controlled by the defendants' own actions. Thus, in this case, the reason for a Brown charge does not exist.

In addition, the language of "ordinary prudence and comprehension" of the victim must also be reconciled with the concept that the mail and wire fraud statutes were intended to protect the gullible as well as the skeptical. United States v. Coffman, 94 F.3d 330, 334 (7th Cir. 1996). Courts of Appeals, including this Circuit, have said that the "reasonably calculated to deceive persons of ordinary prudence" phraseology should focus on the defendant and "provides the fact-finder with a standard for determining from the accused's actions whether the accused possessed the requisite mens rea for his actions." United States v. Coyle, 63 F.3d 1239, 1243 (3d Cir. 1995).

In this case, the evidence as to the sophistication with which this scheme was conducted, the multiple levels of fraudulent activity among the conspirators, and the cover of a contrived bid price in the secondary market at the core of the scheme would certainly sustain the finding by the jury that the misrepresentations and omissions in this type adequately showed defendants' intent to commit wire fraud and securities fraud, neither of which could not have been detected by persons of ordinary prudence and comprehension.

C. Challenges to the Jury Instructions

As a general principle, it is important to note the following admonition at the outset of this discussion regarding jury instructions:

> The trial judge is given substantial latitude in tailoring the instructions so long as they fairly and adequately cover the issues presented . . . . Equally important, the propriety of a given instruction, or the failure to give a particular instruction, is not received in the abstract; rather, the adequacy of the entire charge is taken in the context of the whole trial is [the] proper scope of inquiry.

United States v. Dozier, 672 F.2d 531, 541 (5th Cir. 1982).

The defendants complain that various parts of the Court's charge were erroneous as a matter of law and entitle them to a new trial. The Court will address these arguments seriatim.

1. Intent

Defendant Mendenhall argues that "numerous jury instructions" (without identifying which instructions) somehow "negated the court's limited instruction on the intent required to convict" under criminal law mens rea standards applicable to securities fraud. This argument fails.

The intent standard for a violation of Section 17(a) of the Securities Act was set forth in an instruction captioned "FRAUD IN THE OFFER OR SALE OF SECURITIES -- 15 U.S.C. § 77Q; SECOND ELEMENT -- WILLFULLY DEFINED." The Court finds that this instruction is fully consistent with the required mens rea showing under Section 24 of the Securities Act of 1934, the section of the Securities Act which makes willful violations of the Act criminal offenses.

The "willful" standard under Section 24 has been defined to mean "to act intentionally or with a bad purpose and to do something that the law forbids." United States v. Gentile,

530 F.2d 461, 469 (2d Cir. 1976). The charge in this case was consistent with that definition, because it instructed the jury that "an act is done willfully if it is done voluntarily and intentionally and with the specific intent to do something the law requires to be done; that is, to act or participate with bad purpose, to either disobey or disregard the law." (Jury Instructions at 31). The Court thus rejects defendants' argument.

2. "Underwriter" Instruction

Defendant Rennert argues that the instruction concerning Forum as an "underwriter," if the jury should so find, was new and effected a prejudicial variance. This argument must also fail.

To begin, the indictment charges that defendants "caused the creation of, offered, and caused the delivery of" shares of the stocks. This language encompasses the activities of an underwriter, even though that specific term was not used in the indictment. The theory expressed by this jury instruction was not to suggest an independent, separate, substantive charge, but rather just to describe for the jury one of the several acts, practices and courses of business in which the jury could find that the defendants engaged in to effect their fraud by circumventing the federal securities laws.

The Court also finds that this instruction was proper as a matter of law. Securities must be registered for distribution unless an exemption is available. 15 U.S.C. § 77e.

Section 4(l) of the Securities Act — one of the exemptions raised by defense counsel at trial and now here — exempts from the registration requirements transactions by persons other than an issuer, underwriter or dealer. 15 U.S.C. § 77d(l). An "underwriter" is defined in Section 2(11) of the Securities Act of 1933 as any person who "offers or sells for an issuer in connection with the distribution of any security or participates or has direct or indirect participation in any such undertaking . . . ." For purposes of Section 2(11), the term "issuer" includes any person directly or indirectly controlling the issuer. If a person or entity is determined to be an underwriter, the exemption under 4(l) is not applicable and the person or entity will be deemed to have acted as an underwriter in an unregistered distribution of securities.

The correct inquiry under the instructions is whether or not the defendants engaged in an unlawful distribution of securities, and if they did, whether that unlawful distribution was one of many acts, practices, and courses of business used to effect the charged fraud. Thus, the question to be addressed is whether there was a conspiracy to violate the anti-fraud provisions that were alleged in the indictment and at issue in this case. This is not a case of whether the defendants engaged in an unregistered distribution under Sections 4(l) and 5 of the Securities Act of 1933. Thus, the defendants' arguments about the availability of these other exemptions is irrelevant to the issues before this Court. The violations at issue in this case

involve fraud, and not whether defendants engaged in unregistered distributions per se under Sections 4(l) and 5 of the Securities Act.

Finally, defendants' argument that they were "surprised" by this potential legal theory at the end of the proceedings is unfounded. The government served proposed jury instructions on defendants prior to the commencement of trial, which included this instruction. Thus, unless defendants' counsel did not review the proposed charge of the government, there could not have been any surprise at the end of the trial.

3. Rule 144 and Regulation S

Yeaman contends that, based on the Court's instructions, the jury could convict if it found that defendants failed to satisfy either Rule 144 or Regulations S. This argument is simply incorrect.

Throughout the course of the trial, the defendants argued that they were in complete compliance with the securities laws. As such, the jury required an instruction on whether the defendants' conduct satisfied, or failed to satisfy, the technical requirements of the law. If the jury found that they did not, the failure to comply with Rule 144 and Regulation S could be considered as additional practices offered as proof that defendants' scheme was intended to violate the anti-fraud provisions of the federal securities laws.

These instructions neither amended the indictment nor authorized or established an independent, substantive violation.

The fact that the securities may not be restricted under some other provision of the federal securities laws is irrelevant to this case because it was in reliance on Rule 144 and Regulation S that the defendants in this case sought to avoid registration. The records in this case of each transfer expressly made reference either to Rule 144 and/or Regulation S. Thus, it was not erroneous for the jury to be instructed exclusively on these two regulations.

Moreover, Yeaman and the government at trial stipulated that the shareholder's list, created by Yeaman's own company, NST, showed that the escrow stocks (in the name of the Pennsylvania Statutory Liquidator) were restricted. Thus, defendant cannot now be heard to argue that some other provision of the federal securities laws may arguably support on argument that the stocks were not restricted because the evidence shows that they were restricted.

Additionally, intent to circumvent the law deprives defendants on their reliance on the safe harbor provisions for purposes of avoiding registration under the Securities Act of 1933. Thus, even if the defendants had been in technical compliance of the law, where their intent was to circumvent it, they may not claim its protection. See SEC Release 33-5223, at 10 (Jan. 11, 1972); Preliminary Notes to Rule 144.

Finally, even if the defendants had complied with the safe harbors or could claim another exemption, they would not be exempt from the anti-fraud provisions of the federal securities

laws. See, e.g., Regulation S, 17 C.F.R. § 230.901-904. When fraud has been committed, neither an exemption from registration nor the filing of a registration statement will prevent liability.

Thus, there is no merit to defendants' contentions about the possible availability of another exemption. It would not save them from a conviction under the anti-fraud provisions.

3. Materiality

Defendant Yeaman contends that the Court erred in its instruction as to "FAILURE TO DISCLOSE -- ADDITIONAL MATERIAL INFORMATION -- HALF TRUTHS -- PRIOR SECURITIES LAW VIOLATIONS" because the Court did not restate its previous instructions that omissions as to prior violations must be found to be "material." Yeaman repeats this complaint as to the "short instruction on page 45 entitled 'Fraud & Deceit -- Financial Statements not in Accord with GAPP.'" Viewing the charge as a whole, the Court finds that Yeaman's argument is without merit.

In the charge on the elements of securities fraud, the Court articulated the test the jury must apply in determining whether "facts stated or omitted were 'material'" and the government must prove that the defendant had a duty to disclose a material fact.12/ (Jury Instructions at 39). Yeaman does not

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12/ The jury instruction, in part, read as follows:

> A fact is material if there is a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the "total mix" of information

(continued...)

claim that this instruction was erroneous, rather he seems to argue that the Court should have repeated the definition of "materiality" each time the Court used the words "materiality" or "material" in its charge. This contention is simply without merit. As stated above, the jury charge should be read as a whole, not as separate and distinct parts. Reading the charge as a whole, it is clear that the jury was equipped with the definition of "materiality" and that the jury could not have failed to appreciate that any finding of material misstatement necessary to convict any defendant of securities fraud required a finding of "materiality" as the term was defined.

5. Market Manipulation

Defendant Yeaman complains that the Court's instructions as to manipulation were "unnecessary and confusing," as well as "erroneous." The Court simply disagrees.

First, contrary to the defendant's suggestion, the government did not charge the wrong statutory scheme for market manipulation of the over-the-counter stocks. Every Court and commission, when faced with this issue, have squarely held that market manipulation of the over-the-counter marketplace is analyzed under and violative of Section 17(a) of the Securities Act of 1933 and Section 10(b) and Rule 10b-5 of the Exchange Act of 1934. See, e.g., SEC v. Lorin, 877 F. Supp. 192, 196

12/ (...continued)
made available to him or her in order for them to use in their investment decision-making process.
(Jury Instructions at 39).

(S.D.N.Y. 1995), modified, 76 F.3d 458 (2d Cir. 1996). This includes criminal cases. See, e.g., United States v. Charnay, 537 F.2d 341 (9th Cir. 1976); United States v. Russo, 74 F.3d 1383, 1390 (2d Cir. 1996). Thus, there is no basis for defendants' criticism of this instruction.

Moreover, the Court's instruction, that a showing of manipulative purpose is not required, was accurate. Charnay, supra; Lorin, supra. Thus, Yeaman's contentions as to these jury instructions do not entitle him to relief.

6. Industry Terms

Defendants' objections to this Court's instruction which defined industry terms are wholly without merit. They were terms used at trial and terms whose definitions would be unfamiliar to any layperson. Instructions as to these terms simply could not prejudice nor benefit one particular party over another. Instead, these instructions provide the jury with needed insight into the securities industry in order to better fulfill their obligations as jurors. Finally, the Court notes that the definitions supplied came directly from the Exchange Act of 1934.

7. Market Manipulation Terms/Practices

The Court finds that any objections with respect to the instructions which dealt with market manipulation terms and practices are wholly without merit. The Court, in these instructions, merely described certain market practices which

have been found to be manipulative. These definitions were necessary because the terms and practices are "terms of art" or only readily understandable if you are actually involved in the securities industry. Thus, the Court instructed the jurors as to these terms so that they could more properly and fairly consider the case.

In addition, these instructions were presented in a neutral manner. The jury instructions simply stated that if these practices were present, then the jury could draw the inference, if it chose, that the practice was done to create a false appearance of activity to support the stock's price. This is an accurate statement of the law.

With respect to the "box jobs" charge, the Court finds that this charge was not erroneous. Once again, the Court merely described to the jury exactly what a "box job" is considered in the securities industry. In addition, the Court instructed that if the jury found that a box job had occurred, then the jury could consider this evidence in determining whether a "scheme, material misrepresentation, practice, or course of business that operated as a fraud" was present. Nowhere in this specific charge did the Court instruct the jury that they should convict the defendants if they found that a box job occurred. Indeed, the Court merely stated that the jury should consider this evidence like any other evidence admitted at trial.

8. Special Unanimity Charge - 15 U.S.C. § 77q(a)

Defendant Jensen now complains that the Court was obliged to instruct the jury that it must be unanimous on which of the three "routes" Jensen was found guilty of violating in Count Eleven, charging securities fraud in the offer and sale of Ecotech stock, under Section 17 of the Securities Act of 1933. 15 U.S.C § 77q(a). Because none of the defendants raised this objection at any time prior to, during or before the jury retired for its verdict, the issue is waived. Fed. R. Crim. P. 30.

9. Court's License to Instruct the Jury

Defendant Yeaman complains that the Court exceeded its license to instruct on such "impermissible topics as legislative history, disputed facts and the government's theories of prosecution." These contentions are without merit.

In a securities fraud case, an instruction to the jury explaining the general purpose of the statutes is not improper. Such an instruction is not prejudicial to the defendant and may be helpful to the jury. United States v. Rachal, 473 F.2d 1338 (5th Cir. 1973).

The Court also finds that instructions that contained the government's contentions were proper. This Court never expressed its personal views about the government's contentions. In addition, the Court always prefaced the government's contentions with the language, "the government contends . . . ." Moreover, the Court specifically instructed the jury that they should assess the weight of evidence underlying such contentions and that it was the jury's independent deliberations which would

determine whether the evidence supported such contentions. See Seidman v. Fishburne-Hudgins Educ. Found., 724 F.2d 413 (4th Cir. 1984). The Court also notes that it requested from the defendants and instructed the jury in full as to what the defendants provided as their theories of defense.

In sum, the Court finds that the charge was fair and accurate in the context of the entire trial and the jury instructions as a whole.

D. Court's Ruling that Findings of Fact of Pennsylvania Insurance Commissioner was Irrelevant and Prejudicial

Before trial, defendants moved to admit the entire Findings of Fact of the Pennsylvania Insurance Commissioner resulting from the liquidation proceedings against World Life, under Fed. R. Evid. 803(8)(C), The defendants renewed their motion at trial. The Court ruled that the evidence proffered was inadmissible under Fed. R. Evid. 402 because it was not relevant to the criminal proceedings under Fed. R. Evid. 401. The Court also excluded the evidence proffered under Fed. R. Evid. 403 because the admission of the Findings of Fact would improperly confuse the issues and mislead the jury from the issue in this case, the defendants' intent to defraud.

Defendants Yeaman and Rennert, joined by others, contend that this ruling was erroneous. Notwithstanding defendants' arguments to the contrary, the Court reaffirms its previous ruling, finding that the Findings of Fact were properly excluded from trial as irrelevant and prejudicial. Thus, the

Court rejects defendants' argument that it committed trial error by excluding the Findings of Fact from evidence.

IV. Conclusion

Accordingly, for the foregoing reasons, the Court will deny defendants' motions for judgment of acquittal and for a new trial.

An appropriate Order follows.

Clarence C. Newcomer, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	CRIMINAL ACTION
v.	:	
PHILIP ANDRE RENNERT, et al.	:	NO. 96-51

O R D E R

AND NOW, this day of September, 1997, upon consideration of Philip Rennert's Motion for a Judgment of Acquittal and/or New Trial; David Yeaman's Motion for Judgment of Acquittal and for a New Trial; Michael Miller's Motion for a Judgment of Acquittal and for a New Trial; George Jensen's Motion for Judgment of Acquittal and for a New Trial; and Nolen Mendenhall's Motion for Judgment of Acquittal and a New Trial, and the government's joint response thereto, it is hereby ORDERED that said Motions are DENIED.

AND IT IS SO ORDERED.

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Clarence C. Newcomer, J.